IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.939 of 2001

Illyas Mohammed Usman Shaikh
& Elias Mohammed Usman Shaikh
residing at Flat No.46, IV Floor
252, Yousouf Building, L.T.Marg,
Mumbai - 400 002. (ar present
in Judicial Custody in Yerawad
Central Prison) ....Appellant.

V/s

1. Shri A.J. Shaikh,
Intelligence Officer,
Narcotics Control Bureau,
Mumbai.

2. The State of Maharashtra ....Respondents.

Mr. L. Chari, Senior Counsel with Mr. A.R. Khan for
the appellant.

Mr. D.N. Salvi for Union of India.

Mr. D.P. Adsule for the State.

CORAM: V.M. KANADE, J.
DATE : 6TH DECEMBER, 2004.

ORAL JUDGMENT:

1. The appellant - original accused has challenged the judgment and order passed by the Special Judge (NDPS), Greater Bombay in N.D.P.S. Special Case No.299 of 1998. By the said Judgment and Order dated 6th/7th August, 2001 the Special Judge was pleased to convict the accused for having committed an offence punishable under section 21 read with section 28 of

the N.D.P.S. Act, 1985 and was pleased to sentence him to suffer R.I. for 10 years with fine of Rs 1 lakh and, in default of payment of fine, to suffer further S.I. for six months. He is also convicted for the offence punishable under sections 23 and 29 read with section 8(c) of the N.D.P.S. Act and sentenced to suffer R.I. for 10 years and to pay fine of Rs 1 lakh and, in default of payment of fine, to suffer S.I. for six months.

2. The appellant was charged by the Special Judge for having entered into criminal conspiracy in the period between April 1998 to 27/5/1998 to transport and export heroin out of India in violation of the provisions of section 8(c) of the N.D.P.S. Act and for having exported out of India 2 kgs. 771.5 gms. of heroin to Mauritius which was seized at Mauritius Airport on 27/5/1998. The appellant was, therefore, charged for having committed an offence punishable under section 29 read with sections 8(c), 21 and 23 of the N.D.P.S. Act. The appellant was further charged for having purchased, possessed and transported the said contraband to Mauritius.

3. The prosecution case, in brief, is that the Narcotic Bureau of Mumbai received information on

1/6/1998 that the Mauritius Customs had arrested two Indian Nationals viz. one Akbar Ali Abjani and one woman Mrs. Shashi Bhagwan Chari on 27/5/1998 as they were found to be in possession of 3 kgs heroin. On 29/6/1998, Mauritius Customs sent xerox statements, travel document, marriage certificate of the two Indian Nationals to the Narcotics Control Bureau, Mumbai. On 15/7/1998, Narcotics Control Bureau at Mumbai arrested the appellant and recorded statements of witnesses. On 21/7/1998, Narcotics Control Bureau received original statements of Ali Akbar and Shashi Chari and photograph of the appellant. On 22/7/1998, Narcotics Control Bureau, Mumbai recorded the statement of the appellant. From the statement recorded by the Anti Drug & Smuggling Unit (For short "ADSU"), it transpired that two arrested Indians viz. Akbar Ali and Mrs. Shashi Chari informed them that they were married and had gone to Mauritius on their Honeymoon trip. The affidavit of their marriage was produced by them and the suitcases which they were carrying were registered in the name of the male passenger. ADSU seized the said suitcases and found that the brown suitcase had 1567 gms of heroin and other suitcase contained 1458 gms of heroin.

4. The authorities - ADSU informed the N.C.B. at

Mumbai that Akbar Ali had informed them that he had married one Rafat Ali at Grant Road who had introduced him to the appellant - original accused herein. Akbar Ali further had disclosed that the accused had proposed to him that they should carry currency to Mauritius and that he would be awarded Rs 10,000/-. This proposal was accepted by Akbar Ali.

5. According to ADSU, Mrs. Shashi Chari had informed them that she had met one Surekha Singh at Sion Station who had introduced to her accused - appellant herein who had told her to perform fake marriage with Akbar Ali and to accompany him to Mauritius under the guise of going on honeymoon trip. The appellant had promised her to pay Rs 10,000/- for carrying currency to Mauritius. According to the prosecution Akbar Ali and Shashi Chari performed fake marriage. Appellant/accused took their passport and purchased their air tickets and Visas through Raj Travels.

6. Further from the communication which was sent by the Officers of the ADSU, it transpired that the appellant had called the said Akbar Ali Abjani and Shashi Chari at Hotel Alka at 21.30 hours on 22/5/1998 and packed their clothes in two suitcases in

the presence of Rafat Ali and Surekha Singh and they were taken to the Airport by taxi. They were told that one person would contact them at their Hotel Silver Beach in Mauritius to take delivery of the suitcases by giving them a ten rupee note having number 758786. Accordingly, on 26/5/1998 they were taken to Sahar Airport by taxi and they boarded Flight to Mauritius. Akbar Ali Abjani informed the Officers of ADSU that the appellant was their boss and Rafat Ali and Surekha Singh were working with him as recruiting agent.

7. After the communication was received from ADSU, the statement of Surekha Singh and Rafat Ali was recorded and the Officers searched the residence of the appellant. He was summoned in the N.C.B's Office and his statement under section 67 of the N.D.P.S. Act was recorded and the appellant was arrested on 15/7/1998. A complaint was filed by the Investigating Officer P.W. 1 - Abdul Shaikh of N.C.B. A charge was framed against the appellant - original accused who pleaded not guilty to the said charge.

8. Prosecution examined 12 witnesses. Prosecution also relied on the communication received by the N.C.B. from the authorities of ADSU regarding search

and seizure of the contraband at Mauritius Airport. The Trial Court held that the prosecution has proved beyond the reasonable doubt that the accused had committed the said offence and, therefore, convicted the accused for having committed the said offence. Appellant has preferred this appeal challenging the said judgment and order.

9. The learned Counsel appearing on behalf of the appellant submitted that the statement of the accused which was recorded by the Officers of N.C.B. was immediately retracted by him on 16/7/1998 at the first opportunity which was available to him. He submitted that the prosecution had failed to prove the offence as alleged against the appellant - accused beyond the reasonable doubt. He submitted that the appellant was entitled to be acquitted. He submitted that the documents which were tendered by P.W.1 - Abdul Jalil Shaikh were not admissible in evidence and further submitted that the Trial Court erred in accepting the said documents on record. He submitted that no presumption could be drawn in respect of the said documents since the documents had been received from the case outside India and, therefore, they would fall within the provisions of Section 66(ii). He submitted that the presumption regarding the contents of these

documents was available only in respect of the documents which fall within the provisions of section 66(i). He submitted that subclause (c) of section 66 made it explicitly clear that only in the case falling under clause (i), the Court can presume the truth of the contents of such documents. He submitted that all the documents which were produced by P.W.1 regarding the information received from the Officers from ADSU were not properly proved and, therefore, these documents were not admissible in evidence. He submitted that these documents were excluded from the evidence adduced by the prosecution. The only evidence which was available against the appellant was his statement which was recorded by the Officers of the N.C.B., Mumbai. He submitted that the said statement had been retracted by the accused immediately on the very next day i.e. on 16/7/1998 and, therefore, as a result of the retracted confession, a conviction could not be based on the confession recorded by the Officers of N.C.B. He submitted that in the absence of any other evidence, conviction could not be based on the statement of the accused. He submitted that none of the witnesses examined by the prosecution had supported the prosecution case. He submitted that, therefore, Trial Court had clearly erred in convicting the accused on

the basis of the documents produced by the ADSU, Mauritius on the basis of the statement of the accused. He further submitted that the Officers of respondent No.1 fabricated the statements of the witnesses and had coerced them to make statement, which fact was admitted by the witnesses in their testimony. In support of the said submission, the learned Counsel has taken me through the evidence of P.W.4 - Shrivastava, P.W. 5 - Nagvi, P.W. 6 - Shukla, P.W. 8 - Mohd. Fariduddin Hussaini, P.W. 9 - Venkatraman Bhatt and P.W. 10 - Vasudev Katariya. He submitted that the evidence of P.W. 11 - Mr. Rawoah, Chief Inspector of ADSU, Mauritius cannot be relied upon as the statements of the two Indian citizens arrested by him viz. Mr. Akbar Ali Abjani and Mrs Shashi Chari are not admissible in evidence under section 25 of the Indian Evidence Act. He submitted that the statements of these two Indian Nationals were recorded by third person in his hand writing which were written at the behest of the Officer. He, therefore, submitted that it could not be said that the said statements were made by the said two Indian Nationals. He further submitted that the reliance placed by the prosecution on section 86 read with section 76 of the Evidence Act regarding admissibility of the documents was unfounded as the

judgment of the Mauritius Court does not fall within the ambit of section 74 of the Evidence Act. He submitted that though the Civil Procedure Code has made special provision in regard to the foreign judgments and its enforcibility, similar provisions were not incorporated in the Code of Criminal Procedure and, therefore, in order to consider whether the said judgment is admissible in Indian Law, the provisions of Evidence Act are required to be considered. He further submitted that the Evidence Act does not prescribe any special privilege in respect of the foreign judgments. He further submitted that delay in serving the summons on the accused on 15/7/1998 was not sufficiently explained by the prosecution as the NCB had received Fax message on 3/6/1998. He submitted that delay in taking action against the accused has not been satisfactorily explained.

10. The learned Counsel appearing on behalf of the respondents submitted that since the main charge against the accused was under section 29 of the N.D.P.S. Act, a presumption was raised under section 35 of the said Act. He submitted that under section 35 of the Act, a duty was cast on the Court to presume the knowledge and intention of the accused regarding

the conspiracy. He submitted that the Trial Court had correctly held that the evidence recorded in the case was sufficient to prove the conspiracy of the appellant - accused with the two convicted accused in Mauritius and two other absconding accused. It is further submitted that the provisions of section 35 would be attracted in the present case and therefore the presumption was raised by virtue of the said section which was required to be rebutted by the accused to prove that he had no knowledge or intention. It is submitted that the accused had not rebutted the said presumption. It is further submitted that the procedure which is required to be followed under the provisions of N.D.P.S. Act had been followed to the hilt which is evident from the evidence of P.W.1, P.W.2, P.W.3 and P.W.12. It is submitted that P.W.11 who was an Investigating Officer in a case at Mauritius wherein two co-accused were convicted has deposed about the involvement of the appellant on the basis of the foreign documents including the judgment of the Supreme Court of Mauritius. It is submitted by the learned Counsel appearing on behalf of the respondents that these documents were proved by the prosecution as per the provisions of the Indian Evidence Act and, therefore, on the basis of this evidence, the prosecution has

proved beyond the reasonable doubt the involvement of the accused.

11. It is further submitted that though P.W.4 to P.W. 10 had turned hostile yet, part of their evidence is admissible and if the said evidence is read alongwith the statements of other witnesses which were recorded under section 67 of the N.D.P.S. Act then the said evidence is sufficient to prove the guilt of the accused beyond the reasonable doubt.

12. The learned Counsel appearing on behalf of the respondents further submitted that the delay in the arrest of the accused could be satisfactorily explained. It is submitted that the information was received by N.C.B. on 3/6/1998. Thereafter, on 29/6/1998, copies of the statements of the two accused who were arrested at Mauritius were received. It is submitted that the appellant was granted bail by the Hon'ble High Court in another case and the Department had approached the Supreme Court for cancellation of the bail. However, the Supreme Court refused to cancel the bail. However, a condition was imposed by the Supreme Court that he should attend the NCB Office for one month. It is submitted that, therefore, it was not possible for the appellant to abscond during

this period and N.C.B. did not take any action till they received confirmation from ADSU, Mauritius regarding his photograph. It is submitted that, therefore, there is sufficient explanation available with the N.C.B. for not arresting the accused. It is further submitted that so far as the retraction of the statement by the appellant on 16/7/2004 is concerned, while retracting the statement he had made a complaint regarding ill-treatment by the NCB Officers. It is submitted that the Trial Court had sent the accused to the Government Hospital for medical check up and nothing could be revealed from the said medical report. The learned Counsel appearing on behalf of the respondents relied upon the Division Bench Judgment of this Court in the case of **Wilberg Peter Torbjorn Florentin Vs. Inspector of Customs Florentin** reported in **2002(3) Mh.L.J. 123.** He submitted that in the said judgment, the Division Bench held that the statement of the accused recorded under section 67 of the N.D.P.S. Act did not lose its credibility only because it is retracted. He submitted that there was no medical evidence regarding the alleged ill-treatment to the accused. He submitted that, therefore, the statement under section 67 of the N.D.P.S. Act had a corroborative value in the evidence of this case. It is further submitted that

though the independent witnesses had turned hostile, the evidence which had been given by them regarding chain of events which had taken place could be relied upon for the purpose of proving conspiracy in the false registration of the marriage of accused Nos. 1 and 2, in the affirmation of an affidavit before the Notary, the other arrangements made by the accused regarding their stay in the hotel before leaving India and the arrangement of travel ticket through Raj Travels. He submitted that these statements coupled with the statements recorded under section 67 of the NDPS Act clearly proved the case of the prosecution beyond the reasonable doubt.

13. It is further submitted that the copy of the judgment of the Supreme Court of Mauritius was duly proved and produced before the Trial Court under sections 74, 78(6) and 87 of the Evidence Act. It is further submitted that the said document was, therefore, admissible in evidence and could be relied upon for the purpose of coming to the conclusion that the appellant - accused had committed the said offence. It is further submitted that the N.D.P.S. Act was enacted as per the International treaty which prescribes certain norms to be adopted by all the countries. It is further submitted that so far as the

order of the Supreme Court of Mauritius is concerned, the said order had become final. It is further submitted that although the procedure regarding search, seizure in Mauritius is not identical with the one prescribed in this country even then there is no reason to question the correctness of the said procedure. It is submitted that from the documents which were received by N.C.B. along with the seizure of heroin from accused Nos. 1 and 2 alongwith the statement of witnesses recorded under section 67 corroborated the statement of the accused and, therefore, it had been proved that the accused had participated in the offence as a king pin and, therefore, he was rightly convicted for the offence punishable under section 8(c), 21, 23, 28 and 29 of the N.D.P.S. Act. The learned counsel in support of the said submissions relied upon three judgments of this Court reported in **AIR 1964 SC 538** [Badat and Co. Bombay Vs. East India Trading Co.], **AIR 1991 SC 45** [Raj Kumar Karwal Vs. Union of India] and **(1996) 4 SCC 659** [State of Maharashtra and others Vs. Somnath Thappa and others.]

14. In the present case, the prosecution has charged the accused for having entered into criminal conspiracy along with others to possess, transport and

export heroin out of India in contravention of the provisions of the N.D.P.S. Act. The prosecution in support of its case has examined 12 witnesses to establish chain of circumstances and to prove the involvement of the accused - appellant herein with the said conspiracy. Out of these 12 witnesses, P.W. 4, 5, 6 and 7 have turned hostile. The prosecution case in a nutshell is that the appellant - Illyas Mohammed Usman Shaikh had conspired with others and had purchased 2 kgs. 771.5 gms. of heroin and had transported the heroin through Abjani Akbar Ali and Mrs. Shashi Chari to Mauritius. Before sending them to Mauritius, he had arranged a fake marriage between the two and a marriage certificate was obtained by him on the basis of the fake marriage. He, along with others, had met in a hotel room and has hatched a conspiracy in the said room. Abjani Akbar Ali and Mrs. Shashi Chari were arrested by the Mauritius Police and the heroin was seized and recovered from the suitcases. The Mauritius Police had informed the Narcotics Control Bureau, Mumbai and had sent photographs and other documents. The co-conspirators Abjani Akbar Ali and Mrs Shashi Chari had confessed before the Mauritius Police and had taken the name of the appellant - Illyas in the trial before the Mauritius Court where they were convicted and

sentenced to undergo imprisonment for life. The Narcotic Control Bureau has relied upon the judgment of the Supreme Court of Mauritius as also other documents which were sent by them to India. They have examined P.W.12 Harshad Giridhar Boricha who is the Inspector who investigated the case in Mauritius. The prosecution has also relied on the statement of the accused which was recorded under section 67 of the N.D.P.S. Act and the statement of the co-conspirators which was recorded in Mauritius. The prosecution has examined the advocate and notary who had prepared the false affidavit of Abjani Akbar Ali and Mrs. Shashi Chari. The prosecution has thus tried to establish the chain of circumstances in order to prove the theory of conspiracy, against the appellant.

15. The prosecution has examined four Officers of N.C.B. i.e. P.W. 1 - Abdul Jalil Shaikh, P.W. 2 - Sadashiv Shankar Asawale, P.W. 3 - Ms. Kanta D. Tejwani and P.W. 12 - Harshad Giridhar Boricha.

. P.W.1 - Abdul Shaikh in his evidence has deposed that he was working as an Intelligence Officer, N.C.B. since June 1997 and on 3rd June, 1998 his Superior received an information from the Anti Drug and Smuggling Squad, Port Louis, Mauritius that two Indian

citizens were arrested as they were found to be in possession of heroin weighing 3 kgs at the airport of Mauritius and that the contraband was seized from the concealed part of two suitcases. In this message, the names of three other Indian citizens were mentioned. He has further deposed that on 29/6/1998 they have received a further fax notice containing photo copies of statement of Abjani Akbar Ali, Mrs. Shashi Chari and photo copies of the pass-ports and tickets, photo copies of marriage certificate and marriage affidavit. On the basis of this information, the house of the accused was searched and no incriminating documents of Narcotic Drugs were found at his residence. The statement of Illyas was recorded under section 67 of the N.D.P.S. Act and he was arrested on 15/7/1998. P.W.1, thereafter, recorded the statements of P.W.5 to P.W.9.

. P.W. 2 - Sadashiv Shankar Asawale has stated in his evidence that he was attached to N.C.B., Bombay as an Intelligence Officer from December, 1996. He has stated that the appellant identified the photographs of Ms. Surekha Singh and Abjani Akbar Ali and Mrs. Shashi Chari. This witness has stated that he has recorded the statement of the appellant on 15/7/1998 and on 16/7/1998. P.W.2 has, thereafter, stated that

he has recorded the statement of P.W. 4 - Maheshprasad Shrivastava.

. P.W. 3 - Ms. Kanta Tejwani has stated in her evidence that she was working as an Intelligence Officer with N.C.B. in July 1998. She has stated that she prepared Summons in the name of Surekha Chari which was served by her peon and the acknowledgement of service was obtained. She has stated that pursuant to the summons, Surekha attended the Office on 14/7/1998. P.W. 3 has further stated that Surekha Chari disclosed that her cousin had been to Mauritius. She has further stated that during the interrogation of Surekha Chari, some photographs were shown and Surekha Chari identified the photographs of Akbar Ali. She also identified the photographs of the two persons as also the photographs of the suitcases. According to P.W.3, Surekha Chari informed her that the suitcases shown in the photographs were given to her cousin by the accused Illyas at hotel Alka.

. P.W. 12 - Harshad Giridhar Boricha has stated in his evidence that he was working with N.C.B. as an Investigating Officer since September, 2000. He has deposed that Mr. Dharamdev Rawoah was the Chief Inspector of Police, officer of ADSU, Mauritius gave

one copy of the judgment of the Supreme Court of Mauritius. He has deposed that the copy of the judgment was attested by Indian High Commission at Mauritius.

16. Out of these four witnesses, the evidence of P.W.3 - Ms. Kanta Tejwani does not assist the prosecution case in any manner since the prosecution has not examined Surekha Chari. Her evidence, therefore, to the effect that Surekha Chari had identified the photographs of Akbar Ali and Shashi Chari cannot be relied upon as it is not corroborated by Ms. Surekha Chari. The prosecution has not given any explanation as to why Surekha Chari is not examined. P.W. 1 and 2, apart from stating the fact that they have received the documents from Mauritius by fax and that they had recorded the statement of the accused under section 67 of the N.D.P.S. Act, does not shed any further light in support of the prosecution case.

17. Apart from the evidence of these four witnesses, P.W. 4 - Maheshprasad Shrivastava, P.W. 5 - Sayed Mohd N. Nagvi and P.W. 6 - Ashok Kumar R. Shukla have not supported the prosecution case.

18. P.W. 4 - Maheshprasad Shrivastava has stated in his evidence that he is a practising advocate since 1978 and was also working as Notary since 1993. He has stated that he was shown the affidavit dated 19/5/1998. He has stated that he had obtained the signature of deponent in his register and that those persons were not known to him and that they were identified by advocate S.M. Naqvi. He has stated that on 18/9/1998, he attended the Office of N.C.B. where five photographs were shown to him. He has stated that the Officer dictated the statement and it was recorded under coercion. This witness was declared as hostile.

19. P.W.5 - Sayed Mohd. Nazir Naqvi has stated in his evidence that he was practising as an advocate since 1987. He was shown affidavit dated 19/5/1998 at Exhibit-22. He has stated that he identified the persons by name Akbar Ali Anwar and Shashi. He has stated that he did not know these persons and he identified them on the basis of ration card. He has stated that his statement was recorded by the Intelligence Officer who had dictated the statement and he had written the same as per the dictation. He has further stated that he did not identify anybody. Though this witness did not support the prosecution

case, he was not declared as hostile.

. From the evidence of P.W. 4 and P.W. 5, it is evident that the Investigating Officer had gone to the extent of pressurising the practising lawyers and had forced them to write the statements as dictated by the Officers of the N.C.B. which reflects a sorry state of affairs regarding the manner in which the investigation is carried out by the Officers of the N.C.B. In their anxiety to book the accused, they have not even spared the practising lawyers. The evidence of these two witnesses therefore creates serious doubt regarding the statements which are recorded by the Officers of N.C.B. It creates doubt and suspicion as to whether the statement of the accused which is recorded under section 67 of the N.D.P.S. Act is voluntarily taken or obtained by force.

20. P.W.6 - Ashok Kumar Shukla is the Manager of hotel Alka. He has stated in his evidence that since 1992, he is working as Manager of hotel Alka at Grant Road. He has stated that on 22/8/1998, the entry in the register discloses that one Akbar Ali Abjani and Mrs. C. Akbar Ali were staying in room No.302 and in room No.312 Rafatali Rehman, Mrs. Shahenaz Rafatali

and baby Upasana were staying as per the entry in respect of room No.312 shown in the register. He has stated that he did not remember whether persons from room Nos.302 and 312 met each other. He has stated that other Officers showed some photographs to him. He was asked to identify the photographs. However, he could not identify anybody. He has also stated that his statement was thereafter recorded on 8/8/1998 and that the statement was dictated by I.O. Shaikh and it was written by him. He has stated that the Officer was telling the answers and he was writing the same in his statement.

. This witness (P.W.6) also has not supported the prosecution case. He has not identified the photographs which were shown to him. He has further stated that his statement was recorded under coercion. He has also stated that the answers were given by the Investigating Officer and he was asked to write those answers in his handwriting. From the evidence of this witness also, it transpires that the Investigating Officer had recorded his statement under duress. In the substantive evidence given by him in the court, however, he has candidly stated that he did not identify the photographs of any person.

21. The prosecution has, thereafter examined P.W. 7 - Yogesh. He has stated in his evidence that he was working as Marketing Manager in Raj Travels and Tours since 1989. This witness was shown tickets which were received from Mauritius Authorities and after going through the same, he has stated that these tickets were issued from his Office.

. This witness (P.W.7), however, has not identified any person. He has merely deposed that two tickets which were received from Mauritius Authorities were issued by their Office to one Afzani Akbarali and Ms. Shashi Chari. Since this witness has not identified any person, his evidence does not assist the prosecution case in any manner.

22. Prosecution has examined P.W. 8 - Mohd. Fariduddin Hussaini. He has stated in his evidence that he was working as an Assistant to Kazi Mohd. Zakeria Quamar. He was the Chief Kazi of Bombay. He has stated that, in his absence, he used to perform nikah between the parties. He has stated that if a Muslim wanted to marry a person from another religion, he would advise them to obtain an affidavit from the court to the effect that the person from the other religion was voluntarily accepting his conversion into

muslim religion and after such an affidavit is brought by the parties, he would perform the marriage according to Islamic Rites. This witness was shown the affidavit dated 19/5/1998 at Exhibit-22 and he stated that he had performed this marriage between Akbar Ali Anwar Ali and the lady by name Shashi Bhagwan Chari on 19/5/1998 and that he had issued the certificate to that effect. He has stated that he receive summons from N.C.B. Office and he accordingly visited the Office with the original record and he wrote his statement in Urdu language. Thereafter, he has stated that he again received summons on 17/9/1998 and was directed to attend the N.C.B. Office on 18/9/1998. He has stated that he was shown five photographs for identification and he had prepared the statement and had written as directed by the Officer Shaikh on two photographs. He, however, stated that he was not in a position to identify those photographs in the Court.

. From the evidence of P.W.8 also, it can be seen that the Officer of N.C.B. had pressurised him to identify the photographs while recording his statement in the N.C.B. Office. He, however, was not in a position to identify the photographs in the Court.

23. The prosecution has, thereafter, examined P.W. 9 - Venkatraman Rana Bhatt. He was the owner of Welcome Hindu Hotel. He has stated that one Rafatali visited and stayed in his hotel on number of days. He has stated that he received summons from the Customs Officers dated 23/7/1998 and his statement was written by the Officer and he had signed the same. He has stated that he did not tell to the Officer that he had seen the bag with the customer Rafatali. However, the Officer had written all these things in his statement. He has further stated that he was shown some photographs. However, he informed the Officers that the person in photographs had never visited the hotel. This witness also has stated in his evidence that he was, thereafter, shown three photographs and he signed on the reverse of the photographs as directed by the Officers.

. This witness (P.W.9) also does not support the prosecution case. He was declared hostile by the prosecution.

24. The prosecution has thereafter examined P.W. 10 - Vasudev Katariya. He has stated that he knew a person by name Rafatali who came and met him at his residence on 18/5/1998 and told him that he and his

wife should appear before Kazi and Notary at Killa Court. He was told to impersonify before Kazi and Notary as Mr. Akbarali and his wife should appear as Shashi Bhagwan Chari. He stated that Rafatali promised to pay Rs 3000/-. Accordingly, he went along with Rafatali and prepared an affidavit which was notarised and, thereafter, he was taken to the Kazi where his marriage was performed and his signatures were obtained on some Urdu papers. He has stated that he received Rs 3000/-. He was, thereafter, summoned at N.C.B. Office on 16/9/1998 and his statement was recorded under section 67 of the N.D.P.S. Act. He identified the photographs of Illyas - the appellant herein.

. It is not possible to accept the testimony of this witness (P.W.10) particularly when the prosecution has not produced any evidence to show that P.W.10 and his wife had signed the affidavit. It was the duty of the prosecution to have examined the handwriting expert to prove that the signature on the affidavit and the marriage certificate was the signature of P.W.10. It is not possible to accept the bare testimony of the witness who claims to have impersonated before the Notary and had signed as Akbar Ali. It is further difficult to imagine that the owner of the hotel will

go to the extent of impersonating another person before the Notary Public and Kazi for a paltry sum of Rs 3000/- and an attempt appears to have been made to link the present appellant with Rafatali and the other two co-accused Akbar Ali and Shashi Chari. Illyas had never visited his hotel. Rafatali has not been identified by him. Out of the 4 photographs which were shown to P.W.10, he identified only one photograph. Even otherwise the evidence of this witness does not take the prosecution case any further.

25. The prosecution has, thereafter, examined P.W. 11 - Dharm Dev Rawoah. He has stated that he was working as Chief Inspector of Police at Anti Drug and Smuggling Unit at Flacq in Mauritius. He has stated that the Customs Officers had arrested Abjani Akbar Ali and Shashi Bhagwan Chari at the airport of Mauritius since they were carrying heroin in two suitcases weighing 2 kgs and 771.5 gms. He has stated that the drugs were sealed in two different envelopes in the presence of Abjani and Chari and their signatures were obtained on these two envelopes and the envelopes were sealed with the customs drug unit seal. He has stated that the recovered drugs were kept in the office of the Customs Drugs Unit. He has

further deposed that on 2/6/1998, the two envelopes were brought to the ADSU Office and the photographs of the envelopes and the two accused were taken and, thereafter, the seals were broken and the drugs were taken out and again photographed. The photographs of the suitcases were also taken. Thereafter, drugs were again kept in two new envelopes and they were sealed in the presence of the accused. He has stated that, thereafter, these two envelopes were taken to the Forensic Science Laboratory by the Customs Officers. Thereafter, the envelopes were sent to the Chemical Analyser and the report showed that the drugs which were found was heroin. He has further stated that he questioned the accused through the interpreter who explained the the question to the accused in Hindi and the replies which were given by the Abjani were translated in English and told to him by the interpreter. He stated that the statement of Abjani was written in Hindi. He further stated that both the accused were sentenced for life imprisonment by the Supreme Court at Mauritius. This witness tendered copy of the judgment of the Supreme Court of Mauritius. This witness has also identified all the photographs. In the cross examination, this witness was asked, whether the goods seized from the accused by the Customs Authority were seized in the presence

of any independent witness? This witness, however, stated that this was not the practice followed in Mauritius and the goods were not seized in the presence of an independent person. He has further stated in his cross-examination that no memorandum of seizure was prepared. In his further cross-examination, he has stated that he came to know about the infringement of law after the goods were seized and two persons were arrested.

26. From the perusal of the entire evidence on record, it can be seen that P.W.4 to P.W. 9 do not support the prosecution case. The prosecution is, therefore, not in a position to adduce independent evidence to support its case that the appellant had created false marriage certificate and has used it for the purpose of sending Akbar Ali and Shashi Chari to the Mauritius. There is no evidence to indicate that the accused had purchased the heroin and had given this heroin to Akbar Ali and Mrs Chari for the purpose of exporting it to foreign country. The evidence, on the contrary, has come on record to indicate that the statements of P.W.4, P.W.5 and P.W. 6 were obtained under coercion and they were made to identify the accused. P.W.7 and P.W. 8 have stated that the Officers had forced them to identify the photographs

when their statement was recorded under section 67 of the N.D.P.S. Act. P.W. 9 also has not identified any one. However, he was declared hostile. The only evidence, therefore, which remains is in the form of judgment of the Supreme Court of Mauritius and the statement of the co-accused Akbar Ali and Shashi Chari which was recorded at Mauritius and the statement of the accused under section 67 of the N.D.P.S. Act. So far as the documents which are tendered by P.W.12 are concerned, the question which falls for consideration is : whether those documents are admissible in evidence and whether they can be relied upon? In this context, it will be relevant to examine the provisions of section 66 of the N.D.P.S. Act. Section 66 of the N.D.P.S. Act reads as under:-

"**66. Presumption as to documents in certain cases.-** Where any document-

(i) is produced or furnished by any person or has been seized from the custody or control or any person, in either case, under this Act or under any other law, or

(ii) has been received from any place outside India (duly authenticated by such authority or

person and in such manner as may be prescribed by the Central Government) in the course of investigation of any offence under this Act alleged to have been committed by a person, and such document is tendered in any prosecution under this Act in evidence against him, or against him and any other person who is tried jointly with him, the Court shall-

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting; and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document."

Sub-clause (i) of section 66 refers to the production of any document from the custody or control of any person under the Act or any other law. The provisions of section 66(i) would not be applicable in the present case as the documents have been received from the place outside India. Sub-clause (ii), however, would be attracted in the present case as documents have been received from the place outside India in the course of investigation of offence under the Act. Sub-clause (c) of section 66, however, states that for documents falling under clause (i), presumption would be raised for the truth of the contents of such documents. From the aforesaid provision, it can be seen that the presumption regarding truth of the contents of the document will arise only in the case of documents which are seized from the custody or control of any person and not in respect of the documents which are received from any place outside India. The other relevant provisions pertaining to the admissibility of the documents are laid down under the provisions of section 74 and 78(6) and section 87

of the Evidence Act where the procedure of admission of public documents of foreign country is laid down.

27. However, without going into the question regarding admissibility of these documents and assuming that these documents are admissible, the question is : whether any reliance can be placed upon these documents? P.W.12 in his evidence has candidly admitted that none of the safeguards which are provided under the N.D.P.S. Act were followed at the time of search and seizure of the contraband from the two other accused. Further, the precautions which are to be taken while sending the samples to the Chemical Analyser also have not been taken by the authorities in Mauritius. In the face of this evidence, the question will be, whether any reliance can be placed on these documents and the statements which were recorded of the co-accused Akbar Ali and Mrs. Chari? It is a settled law in India that since the punishment under the Act is very harsh and the provisions under the N.D.P.S. Act are very stringent, safeguards which are provided under the Act have to be scrupulously followed. From the evidence of P.W.12, it can be seen that no safeguards have been followed by the authorities in Mauritius. It will not be safe, therefore, to rely on the said evidence regarding

search and seizure of the contraband at the Mauritius airport. Therefore, even assuming that the said documents produced by P.W.12 are admissible in evidence, it will be unsafe to rely on these documents for the purpose of connecting the other accused Akbar Ali and Mrs. Chari with the present appellant.

28. The only other evidence which remains is the statement of the accused which is recorded under section 67 of the N.D.P.S. Act. This statement has been retracted by the accused at the first available opportunity. A complaint was made by the accused to the Magistrate and he was sent for examination to the medical authorities. Though it is proved that no injuries were found on his person after medical examination, the question is : whether the appellant can be convicted solely on the basis of statement recorded under section 67 of the N.D.P.S. Act in the absence of any other independent corroboration? In my view, it is not possible to rely on the statement of the accused which was recorded under section 67 because as many as 4 witnesses have stated in their evidence that they were forced by the Investigating Officer to make statement as per the directions given by the Officers. P.W. 4 and P.W. 5 who were practising advocates have candidly stated in their

evidence that they were forced to record the statement and the answers were dictated by the Officers. P.W.6, P.W.7 and P.W. 8 also have stated that the Officers had forced them to identify the photographs. In the light of the testimony of these witnesses, it is difficult to accept the statement of the accused which is recorded under section 67 of the N.D.P.S. Act and it is not possible to convict the accused solely on the basis of this statement which has been recorded under suspicious circumstances. There has been delay in recording the statement of the accused. The N.C.B., Mumbai had received an information on 3/6/1984 about the seizure of drugs at Mauritius. No steps were taken by them for a period of six weeks and only on 15/7/1998 the accused herein was arrested and his statement was recorded. The statement of the appellant was recorded on 15/7/1998 and it continued to be recorded on 16/7/1998. The appellant at the first available opportunity retracted the statement and made a complaint to the Magistrate. All these circumstances create doubt regarding voluntary nature of the statement. Thus the prosecution has not proved the chain of circumstances and has failed to prove the case of conspiracy against the appellant. The judgment and order of the Trial Court, therefore, will have to be set aside. The Trial Court has given undue

weightage to the evidence of witnesses who have turned hostile and has convicted the accused on the basis of the statement recorded under section 67 of the N.D.P.S. Act. The Judgment and order of the Trial Court is set aside.

29. Accordingly the following order is passed:-

O R D E R

. Appeal is allowed.

. Appellant is acquitted of the offence punishable under section 8(c) read with section 23 alongwith section 29 of the N.D.P.S. Act.

. Appellant to be released forthwith unless he is otherwise required in any other case.

. Issuance of certified copy expedited.

V.M. KANADE, J.